

aggressively recruit minorities to fill vacancies as they become available.

Ninety-Eight Licensees comments that the Commission has not clarified the way the 66/33 standard will interact with the 50/50 standard. Far from being confusing, the 66/33 standard serves as a objective guideline to assess the effectiveness of a licensee's recruitment efforts. The EEO Policy Statement, 9 FCC Rcd 929 (1994) and the cases interpreting it, make it very clear that the 66/33 standard will be used to make an upward adjustment in the base forfeiture amount, and the 50/50 standard, assuming a licensee meets it, will be used to make a downward adjustment of the same amount. Licensees who meet the parity guideline will have that fact taken into account.

Ninety-Eight Licensees, at 11, remarks that the 66/33 standard penalizes licensees for circumstances beyond the licensee's control -- the failure of its referral services to refer minority applicants to the station. However, the choice of referral services is entirely within a licensee's control. The Commission's EEO program requires licensees to conduct self-assessment of their EEO programs. If referral services are not referring an adequate number of minority and female applicants, the licensee, as part of its self-assessment, should use other sources.

The 66/33 test is quite flexible. In the ideal case, minorities would have a chance to compete for each job; the polar opposite case is one in which minorities only compete against one another for a handful of jobs (such as those deemed "suitable" for minorities; see Rust, supra. The fact that the guideline is set at 66% and not at 100% shows that the Commission allows wide latitude

for random market irregularities before forfeiture liability might attach. The Commission's selection of an evidentiary test which allows considerable flexibility shows that the Commission thought about and responded favorably to the concern the NAB has expressed. Having done so, it has met the "relevant factors" test for reasoned decisionmaking and it has very wide discretion on where to draw the numerical lines. See Beach, supra.

**C. Designation for Hearing Should Not Await
Three License Terms of EEO Violations**

The NAB, at 11-12, advocates a so-called "three strikes and you're out" approach to EEO compliance.

This baseball analogy is not a substitute for rational debate. Baseball players get three attempts to achieve the difficult task of hitting a ball travelling over 90 miles per hour. That is far more difficult than the task of complying with the EEO Rule, especially when licensees have five or seven years to show compliance.

The "three strikes" proposal would essentially overrule NBMC v. FCC, 775 F.2d 342 (D.C. Cir. 1985), which held, inter alia, that a licensee's noncompliance in an earlier license term is strong evidence of continued noncompliance in the term under review and could stand as evidence of recidivism which, along with other evidence, might require a hearing. The "three strikes" proposal would postpone accountability for up to 21 years. In no other area of civil rights jurisprudence must a finder of fact wait nearly a generation before complainants even receive a hearing on the underlying noncompliance. Given the rapid staff turnover and inter-market movement of broadcast employees -- not to mention the rapid turnover in station ownership -- even a "two-terms of

violations" requirement for hearing would immunize virtually the entire industry from hearing, or from witness availability during a hearing, no matter how invidiously the licensee discriminated. No such broad scale immunization from regulation is permissible. UCC III, supra.

There is something to be said for progressive discipline, but no refinement of the EEO Rule is necessary to achieve it. The Commission already considers recidivism when it evaluates renewals. Stringing out the enforcement process over three license term would only produce disrespect for the Commission's seriousness about EEO enforcement.

D. The Forfeitures Issued Since February 1, 1994 Should Remain In Effect

Named State Broadcasters, at 19, urge rescission of all forfeitures issued since February 1, 1994, largely on the basis that the relatively greater size of the forfeitures signalled that the EEO Rule had been amended sub silentio, and that this supposed rule change was then applied retroactively. Inherent in its argument is that the EEO Policy Statement is not a genuine policy statement but is really a rule in disguise.

This argument is being considered in USTA v. FCC, No. 92-1321 (D.C. Cir., briefed March 25, 1994) and the Commission should await the Court's ruling before turning to this question. However, Commenters offer a few brief thoughts.

On February 1, 1994, the Commission did two things: (1) it began imposing higher fines, and (2) it articulated examples of types of evidence it would consider in evaluating whether the EEO Rule had been violated. Neither of these things in any way changed the underlying Rule.

It is very important that the Commission firmly defend its decision to proceed by policy statement. A policy statement occupies an intermediate decisional space between a ministerial housekeeping order and a rule. Unlike a rule, a policy statement only provides guidance and is nonbinding. See 5 U.S.C. §553(b)(3)(A) (exempting "general statements of policy" from notice and comment requirements). Yet like a rule, a policy statement is "subject to complete attack before it is finally applied in future cases". Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 39 (D.C. Cir. 1974). Thus, it is logical that the intermediate decisional strength of a policy statement translates into an intermediate level of process due to those affected.

The intermediate range of due process for affected parties logically matches the intermediate nature of a policy statement. While a rule can be waived, see 47 CFR §1.3, the proponent of a waiver carries a heavy burden of persuasion. WAIT Radio v. FCC, 418 F.2d 1153, 1157-58 (D.C. Cir. 1969), cert denied, 409 U.S. 1027 (1972). No such burden attends one who wishes an agency to depart from strict observance of a policy statement. Like a rule, a policy statement provides a window on agency expectations of its regulatees, albeit the windowshades may be drawn somewhat.

Agencies often find that an intermediate range regulatory weapon is preferable to an intercontinental ballistic missile. Occasionally, an agency needs the flexibility to creatively experiment with issues whose locus of impact falls some distance from the agency's traditional realm, or to take a first halting step toward addressing a complex moral issue. The public has benefitted enormously because the policy statement mechanism has given the FCC the freedom to innovate. See, eg., Policy Regarding

Character Qualifications in Broadcast Licensing, 102 FCC2d 1179 (1986), recon. granted in part, denied in part, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. National Association for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir., June 11, 1987), modified, 5 FCC Rcd 3252 (1990); Policy Statement on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978), upheld against equal protection challenge in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). To avoid severely crippling that innovative power, the Commission should again reaffirm that the EEO Policy Statement is flexible, and is not and was never intended to represent a binding rule.^{22/}

III. THE URGENT NEED FOR COMMON CARRIER EEO REGULATION

Contrary to the claims of some industry commenters, revised EEO oversight in the common carrier field will greatly advance the goal of minority and female representation in upper management. As noted earlier,^{23/} the Commission has never verified the accuracy of the annual employment reports submitted by common carriers for the past twenty years. No industrywide data on employment practices has ever been compiled by the Commission. As common carriers and content-based services begin to compete in the same marketplace, the Commission must take steps to enforce uniform EEO requirements.

^{22/} Hopefully nobody suggests that licensees would have exhibited less disobedience to the EEO Rule if they had only known that larger forfeitures might be assessed. That is like a speeder caught going 100 telling the Judge "if I'd known the State was going to raise the sentencing guidelines to recommend that you fine me \$500 of your \$10,000 limit, and not the \$200 I thought I'd pay, I would have only driven 85 instead."

^{23/} Comments of LULAC et al. at 4 n. 2.

**A. FCC Oversight Of Common Carriers Is Fully
Warranted To Promote EEO In Upper Management**

Ameritech and US West have opposed EEO regulation of "multichannel video program distributors" ("MVPDs"), under the 1992 Cable Act. These carriers contend that they are subject to a "plethora of EEO requirements"^{24/} and that "[a]ny further regulation...would be duplicative."^{25/}

Far from being duplicative of other regulations, there is great need for Commission EEO oversight in order to promote equal opportunity in upper management.

By extending the coverage of the EEO provisions of the Cable Act to the "new, emerging, and alternative technologies,"^{26/} Congress was particularly concerned about improving the ability of the Commission to monitor industry employment trends in senior level positions.^{27/} Hence, the "manager and officials" job category was transformed into six new job categories.^{28/}

With appropriate categories for the common carrier industry, the Commission would be in a position to vastly improve its ability to monitor and enforce EEO. As noted in comments submitted earlier, it currently "impossible to accurately ascertain the number of minorities and woman in top management." This is because "seven layers of management are consolidated into the

^{24/} US West Comments at 5.

^{25/} Ameritech Comments at 2.

^{26/} House Committee on Energy and Commerce, H.R. Rep. No. 102-628. 102d Cong., 2d. Sess., at 113.

^{27/} Id. at 112.

^{28/} Section 634(d)(3) of the Cable Act of 1992.

manager and official job category for FCC reporting purposes."
Comments of LULAC et al. at 5-6.

The following six job categories can be appropriately
substituted for the "officials and managers" classification:

Job Category

Corporate Officer

Company officers such as the Chief Executive
Officer, President, Executive and Senior Vice
Presidents, and Vice Presidents.

Assistant Vice President

Non-corporate officials reporting directly to
Corporate Officers.

Division/Regional Manager or Director

Has extensive budget personnel authority.

District Manager/Director

Supervises Area Managers/Account Executives.
Assists in the development and supervision of
budget.

Area Manager/Account Executive

Supervises non-management personnel and also
assists in the development of policies and
procedures.

Supervisor

Supervises non-management personnel.
Responsible for eight to thirty subordinates.

The Commission should dismiss the contention that
application of Section 634 of the Cable Act would be duplicative.
For the past 20 years, under present regulations, not one
regulatory agency has compiled an extensive industry employment
trend report. Clearly, there is a need for additional EEO
oversight that will enable the Commission to monitor and enforce
EEO with respect to each of the dominant carriers and the industry
as a whole.

**B. Common Carriers Which Have Won The Right To
Offer Cable Service Should Be Subject To
The EEO Provisions Of The Cable Act**

Bell Atlantic correctly states that it is subject to the EEO provisions of the Cable Act due to its newly won right to provide cable service within its telephone service area. US West, on the other hand, challenges such regulation despite a court ruling granting it the right to provide cable TV service.^{29/}

Given this dichotomy of positions, the Commission should affirm that common carriers that have obtained a judicially granted right to provide cable TV service are subject to the EEO provisions (Section 634) of the Cable Act. EEO oversight should apply to all video programming operations, including video-dialtone service, because presumably a carrier will use their right to control programming in the context of all technological delivery systems.

^{29/} US West Comments at 5. See US West v. United States of America, No. C93-1523R, (W.D. Wash., June 15, 1994).

Respectfully submitted, 30/

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July 1, 1994

30/ These Reply Comments are tendered three days out of time,
Owing to the unexpectedly large number of industry comments
which needed to be digested, and the need for the Commenters and
their counsel to participate in the review process, it was
impossible to file timely. Commenters respectfully request
consideration of these Reply Comments nunc pro tunc.

EXHIBIT 1

**1993 IMPUTED PERCENTAGES OF PARITY FOR
MINORITY EMPLOYMENT FOR THE NETWORK O&O's**

Prepared by David Honig for
the NAACP, June 10, 1994 */

| <u>Station Group</u> | <u>Imputed Percentage of Parity, Top Four Category Employees</u> | <u>Imputed Percentage of Parity, Total Fulltime Employees</u> |
|---------------------------------------|--------------------------------------------------------------------------|-----------------------------------------------------------------------|
| Capital Cities/ABC Broadcast Group | 82.4% | 89.9% |
| CBS Broadcast Group | 80.2% | 88.3% |
| Fox Television Stations, Inc. | 73.3% | 83.4% |
| NBC Television Stations Division | 62.8% | 70.2% |

*/ The NAACP reviewed each network's 1993 (the latest available) Form 395 data for the O&O's they owned as of 1992 which were required to have an EEO program for minorities (eight ABC O&O's, seven Fox O&O's, six CBS O&O's and six NBC O&O's). Owing to the unavailability of 1993 data for Fox' WNYW-TV and CBS' WBBM-TV, 1992 data was used for those stations. Percentages of parity (the ratio of the percentage of minorities at the station to the percentage in the MSA population) were calculated for each station. Then each station group's imputed percentage of parity was calculated by weighting each station's individual percentage of parity by the percentage of the O&O group's total employees the station had. These calculations were performed both for top four job category employees (aggregating officials and managers, professionals, salespersons and technicians) and for all fulltime employees.

The national average for the television industry is approximately 75% of parity for the top four categories and 80% of parity for all fulltime employees.

The underlying database may be obtained from David Honig, NAACP Counsel, by calling (202) 332-7005 or by faxing a request to (202) 332-7511.

EXHIBIT 2

DECLARATION OF DR. JOHN T. BARBER

I, Dr. John T. Barber, respectfully state as follows:

I am Chairman of the Department of Telecommunications at Morgan State University. I hold a Ph.D from Howard University in Mass Communication. I am a former Senior Fellow with the U.S. Congressional Black Caucus and in that capacity have written papers on black political leaders and their relationship with the media. I have at least 20 years experience as a radio producer, journalist and talk show host in Washington D.C. and St. Louis, Missouri and I have several years of experience as a writer/editor in federal government public information.

I am providing this Declaration at the request of several national civil rights organizations which have filed comments in the FCC's EEO Inquiry MM Docket No. 94-34.

The Department of Telecommunications at Morgan State University was established in 1984 and provides an undergraduate degree program which concentrates on preparing African American students for careers in the electronic media and public relations industries. Our program is designed to prepare students for employment in radio, television, broadcast journalism, public and corporate relations, cable television, satellite communications, and newly emerging information technologies. Our enrollment is steadily increasing and over the past three years we have had more than 300 majors each year. On the average, each year, 50 black students have graduated from our program with Bachelor of Science or Bachelor of Arts degrees. A survey of our 1993 graduates, nearly all of whom were African-American, reveals that our former

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students have obtained jobs all over the nation in fields such as broadcast journalism, media production, public relations, market research and sales. Several of our recent graduates have landed jobs with major production houses including Paramount, NBC, and The Corporation for Public Broadcasting.

I understand, however, that some of the comments filed in response to the Notice of Inquiry have argued that it is difficult to "identify" qualified minorities who are ready, willing and able to work in small market broadcast and cable. Morgan State University, like many other Historically Black Colleges and Universities, stands as a rich source of such potential workers. In classes, counselling sessions, career development seminars, conferences, and job fairs our majors are constantly encouraged to pursue small markets to obtain their first jobs. One of our graduates, for example, recently returned to visit our classes and told students how he had worked his way from a small to a major market in television journalism. Our professors and students understand that a Bachelor of Science or Bachelor of Arts degree in communications usually yields little until the recipient "pays some dues." Paying dues frequently means working in small markets before gaining employment in larger ones. This is a typical career strategy for a black communications graduate.

It is therefore difficult for me to understand why anyone would assert that they are unable to find qualified African Americans who are ready, willing and able to work in small market

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positions. Morgan Telecommunications graduates are well prepared to work in small markets in broadcast, cable, and related fields. Each year 40-50 black graduates are so prepared.

I find it difficult, however, to identify small market broadcast and cable employers who are ready, willing and able to hire our graduates. Such employers have hardly reached out to open lines of communication about employment with us nor have any come to our campus to recruit our fine students. In most cases, our professors and students have to take the initiative in contacting employers and pursuing leads for internships and jobs.

Let it be stated clearly then, that the Department of Telecommunications at Morgan State University stands ready, willing and able to identify and present minority graduates, mainly African American, who are prepared to take jobs in small market broadcast and cable positions. Furthermore, this Department would welcome the opportunity to participate in any career development and/or recruitment activities that would remedy the problem of locating minorities to work in any of the various fields of Telecommunications. Finally, the argument that "we just can't find any qualified minorities" is an old, overworked, code phrase frequently used by those who would practice job discrimination against blacks and other minorities. As we move toward a new era of global communications, we must find ways to create a multicultural work place in the field of mass communications and not revert to the pathetic cliches and discriminatory employment

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practicies of the pre-civil rights era. Morgan State University and other Historically Black Colleges and Universities that offer degrees in communications, should be the primary places where employers look to find the workers who will make up the culturally diverse work force for the telecommunications industries of the future.

This statement is true to my personal knowledge and is made under penalty of perjury under the laws of the United States of America.

Executed June 27, 1994.

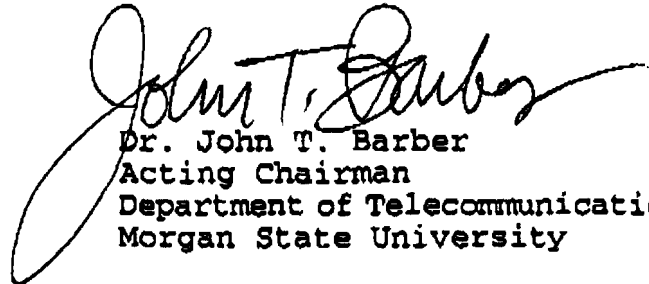

Dr. John T. Barber
Acting Chairman
Department of Telecommunications
Morgan State University

EXHIBIT 3

I, Jannette L. Dates, respectfully state as follows:

I am the Acting Dean of the School of Communications at Howard University. I received a B.S. degree from Coppin State College, an M.Ed. from the Johns Hopkins University, and a Ph.D. from the University of Maryland at College Park. In addition to my current role as acting dean of the School, I am an associate professor in the Department of Radio, Television and Film; I served as a Fellow at the Freedom Forum Media Studies Center at Columbia University, 1992-93; and I was the associate dean of the School of Communications, 1987-1992.

I have also served in various capacities for professional associations such as the Association for Education in Journalism and Mass Communication, the Speech Communication Association and the Broadcast Education Association. A book which I co-edited, entitled Split Image: African Americans in the Mass Media, received the 1992 Gustavus Myer Award as the best book written in the United States in the area of human rights. It is in use in classes at colleges and universities across the country. Additionally, I have written numerous other book chapters and articles relative to the effects of the mass media on society and I have served on many panels and programs for professional organizations and industry-wide broadcast groups.

The Howard University School of Communications was established in 1971. The School boasts approximately 1,500 graduates in radio, television and film. Ninety-nine percent (99%) of its graduates are Black. Students enrolled in the School come from every state within the continental U.S. including Alaska and Hawaii. In a survey conducted in 1991 responses from graduates indicated that approximately fifty percent (50%) are currently working in broadcast (radio and television), cable, or corporate communications.

I am providing this Declaration at the request of several national civil rights organizations which have filed comments in the FCC's EEO Inquiry, MM Docket No. 94-34.

I understand that some of the comments filed in response to the Notice of Inquiry have argued that it is difficult to identify "qualified" minorities who are ready, willing and able to work in small market broadcast and cable positions. This argument lacks validity for the following reasons:

1) There are 39 Historically Black Colleges and Universities (HBCU's) with communications programs, five of which are accredited by the Accrediting Council in Education in Journalism and

Mass Communication (ACEJMC), the professional accrediting association. 2) These HBCU's carefully prepare their predominantly African American student bodies by a) counseling them to go to small markets to build their careers, b) preparing them for readiness to work at a variety of jobs in broadcasting, cable, government, corporate communications and the like, and c) mentoring them to understand and be prepared to accept the lower pay they will earn in small markets in order for them to get a start in the industry.

The Howard University School of Communications is and has always been committed to excellence in education. Its faculty members not only hold terminal degrees but are nationally recognized authorities in their respective fields. Students majoring in radio, television, film and broadcast journalism enroll in and successfully complete coursework in the following courses: Introduction to Media Production; Basic TV and Film; Radio Production; TV Directing; TV Technical Operations; Advanced Radio Production; Radio Practicum; TV Practicum; Videography; Scriptwriting for TV; Scriptwriting for Radio; Fundamentals of Journalism; Reporting and Writing; Advanced Reporting and Writing; Introduction to Broadcast News; Broadcast Journalism I & II, and Electronic News Gathering. In addition to this very fine academic preparation, students in the School of Communications are required to receive hands-on training in their fields through internships and practica.

In 1988, the Howard University School of Communications established an Office of Career Development to provide full-scale career assistance to its students and alumni including, but not limited to, resume, cover letter, and portfolio preparation; interviewing assistance; internship and employment placement and the production of an Annual Communications Job Fair. We

strongly encourage all media organizations to recruit at our job fair. Many small stations decline to do so, despite their stated interest in hiring minorities for their workforces.


The Office of Career Development was designed to serve as a liaison unit between the students and alumni and all broadcast and cable groups across the country. Current listings of all cable, radio and television stations across the U.S. are maintained within the Office of Career Development.

Howard University graduates continue to qualify for employment in small markets as is evidenced by the School's alumni. Many are working and have worked at such smaller stations as **WSRX Radio, Naples, FL; WIOK-TV, Meridian, MS; KFOR-TV, Oklahoma City, OK, WOWI Radio, Norfolk, VA** just to name a few. However, something is obviously amiss when one considers that a greater number of our alumni find employment in medium to large markets than in small markets. A significant number of the School's alumni work for **C-SPAN; CNN; ABC-TV/Radio; CBS-TV/Radio; NBC-TV/Radio; Black Entertainment Television; HBO,** and **MTV** largely in New York, Washington, D.C., Los Angeles, CA; Atlanta, GA and many other cities in the top 20 broadcast markets. Further demonstration of the competencies of the School's alumni comes by way of its Annual Job Fair. Nationally recognized recruiting organizations have continually participated in the event largely due to the quality of the candidates that they interview and hire. For over 20 years, solicitation has gone out to stations in small, medium and large markets to participate in this large minority recruiting effort. Yet, as noted, very few small market groups participate in the Job Fair.

Howard University prepares its graduates for career entry and escalation. Again, I must state that it is our experience that, too few small market broadcasters recruit on black campuses. Television, radio and cable groups in small markets need to put forth a much greater effort to recruit, hire, retain and promote minorities if their workforces are ever to reflect the plurality of our society. As we have demonstrated, we at Howard University, and at the other HBCU's are ready to work with achieving the goal of greater diversity in the workforce.

This statement is true to my personal knowledge and is made under penalty of perjury under the laws of the United States of America.

Executed July 1, 1994.

A handwritten signature in cursive script, reading "Jannette L. Dates", written over a horizontal line.

Dr. Jannette L. Dates
Acting Dean
School of Communications
Howard University

EXHIBIT 4

**REPRESENTATIVE, RECENT BROADCAST EEO DECISIONS
INVOLVING SMALL MARKET BROADCASTERS**

WROV(AM) ADI 97 6 FCC Rcd 1421 (1991)
Failed to use sources likely to attract female and minority applicants. Did not engage in self-assessment.

WMMK(FM) ADI 212 5 FCC Rcd 4893 (1990)
Did not retain records of the number, race, gender or recruitment sources of interviewees. No minorities hired. Did not contact sources likely to result in minority applicants.

WTRS(AM)/WTRS(FM) ADI 111 5 FCC Rcd 4893 (1990)
Made no attempt to contact minority-oriented recruitment sources. Did not engage in self-assessment.

WPFM(FM) ADI 226 5 FCC Rcd 4893 (1990)
Did not contact requirement sources with specific job vacancies. Failed to keep records; i.e., no interviewee information retained. No self assessment until the end of the license term.

WNDB(AM)/WWLV(FM) ADI 107 7 FCC Rcd 6045 (1992)
Maintained virtually no records.

WNOG(AM)/WCVU (FM) ADI 196 5 FCC Rcd 5683 (1990)
No documentation of recruitment efforts. Did not retain sufficient records to self-assess.

WYYN(AM)/WTNT (FM) ADI 170 5 FCC Rcd 5683 (1990)
Failed to contact minority-oriented recruitment sources. Failed to maintain adequate hiring records.

WAVF(FM) ADI 85 6 FCC Rcd 4672 (1991)
Failed to maintain adequate records. Failed to self-assess in meaningful manner.

KBIS(AM)/KHLT (FM) ADI 82 6 FCC Rcd 5868 (1991)
Maintained almost no records of minority referrals, applicants or interviewees. Failed to keep records.

WVNA(AM)/WVNA (FM) [not in ADI] 6 FCC Rcd 5968 (1991)
Failed to self-assess and failed to revise recruitment practices.

WBHP(AM) ADI 108 6 FCC Rcd 5968 (1991)
Did not adequately self assess its EEO program. Did not hire any minority applicants. Limited flow of minority applicants.

WXBM(FM) ADI 126 6 FCC Rcd 7356 (1991)
Did not communicate with sources of qualified applicants. No self-assessment. Did not maintain records.